APPENDIX — SUPPLEMENTAL BRIEF OF THE UNITED STATES OF AMERICA DATED JUNE, 1992

Nos. 91-3400 & 91-3478

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
Cross-Appellant,

v.

THOMAS C. HYNES, Assessor of Cook County, Illinois;
EDWARD J. ROSEWELL, County Treasurer and Ex Officio
County Collector of Cook County, Illinois; and
THE COUNTY OF COOK, ILLINOIS;

Defendants-Appellants,
Cross-Appellees.

SUPPLEMENTAL BRIEF FOR THE
UNITED STATES OF AMERICA AS
APPELLEE AND CROSS-APPELLANT

Appendix

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This brief is submitted in response to the order of this Court filed herein on June 10, 1992.

Appendix

ARGUMENT

THE UNITED STATES' CONSENT TO TAXATION IN 40 U.S.C. SECTION 602a(d) IS A GENERAL CONSENT TO STATE PROPERTY TAXATION, BUT IS NOT A CONSENT TO DISCRIMINATORY STATE PROPERTY TAXATION

By its order of June 10, 1992, this Court ordered the parties to this appeal to submit supplemental briefs on the issue as to whether this Court should overrule its ruling in *United States v. County of Cook, Ill.*, 725 F.2d 1128, 1131 (7th Cir. 1984) that:

> The consent found in section 602a(d) lacks the specificity we would expect to find if Congress intended to subject the United States to discriminatory taxation. Accordingly, we reject the argument [to the contrary] appellants advance.

The argument which this Court rejected in the above 1984 decision was Cook County's argument that the United States not only consented to the state property taxation of federal buildings being built and purchased under an installment purchase contract by virtue of 40 U.S.C. § 602a(d), but it had also consented by that statute to state property taxation which discriminated against federal property in favor of state and local governmental property. In that earlier case Cook County argued that the United States did not come within the term "governmental body" as used in Ill. Rev. Stat., ch. 120, ¶ 500.9a (1984), which exempted real property of a "governmental body" such as the state's

and local governments' from taxation. This Court in its 1984 decision rejected the County's argument, and held that the exclusion of the United States from the term "governmental body" would create a scheme of taxation that would unconstitutionally discriminate against the United States. Further, this Court held that while the United States could consent to such a discriminatory tax scheme, any such consent must be specific and explicit and that the consent contained in 40 U.S.C. §602a(d) did not explicitly or specifically consent to discriminatory taxation but rather was a mere general consent to non-discriminatory state taxation of federal real property. This Court held the Federal Government to come within the term "governmental body" so that federal property was also exempt.

After that 1984 decision, Illinois amended ¶ 500.9a to provide that property of a "governmental body" was exempt from real property taxation except in situations wherein the "governmental body" consented to taxation. In amending ¶ 500.9a, the Illinois Legislature did not consent, however, to the taxation of any state or local governmental property but left all of such property exempt from taxation under ¶ 500.9a.[1] Using ¶ 500.9a as a predicate, Cook County[2] argues in the instant case that by virtue of § 602a(d) the United

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1. It should be noted that defendants-appellants can point to no local governmental body in Illinois, including Cook County, which has attempted to consent to taxation of its real property.

2. We shall hereinafter refer to the defendants-appellants Cook County, Illinois, the Cook County Assessor and the Cook County Treasurer and Ex Officio Tax Collector collectively as defendant or Cook County.

States has consented to state real property taxation under Ill. Rev. Stat., ch. 120, ¶ 500.9a, as amended, and that the scheme of taxation created by ¶ 500.9a is not discriminatory because all governmental bodies, including the United States, the State, and local governmental bodies, can elect to be taxed or not. In its Appellee's brief and in its Reply Brief as Cross-Appellant the United States amply demonstrated that the instant tax scheme discriminates against the United States, as the Illinois Legislature amended ¶ 500.9a for the sole purpose of negating this Court's 1984 decision so as to tax only the involved property of the United States and at the same time retain the tax exemption for all state and local governmental property. Such a tax scheme is clearly discriminatory and would be unconstitutional as violative of the Constitution's Supremacy Clause unless the United States consented to discriminatory taxation by 40 U.S.C. § 602a(d). The question the Court herein has posed is whether the Court in its earlier 1984 decision wrongly decided that § 602a(d) was a mere general consent to state taxation and was not a consent to discriminatory state taxation. The Court's ruling in its 1984 decision was correct, is consistent with applicable Supreme Court precedent and should not be disturbed.

The language of § 602a(d) is stated in the simplest of terms with an absolute minimum of verbiage as follows:

> With respect to any interest in real property acquired under the provisions of this section the same shall be subject to State and local taxes until title to the same shall pass to the Government of the United States.

Logic and three cardinal principles of constitutional law dictate that the above language be construed only as a general consent to property taxation by the United States, but not be construed to be an unrestricted consent to state tax schemes that discriminate against the United States.

First, it is axiomatic that the Supremacy Clause of the United States Constitution prohibits a state from directly taxing the United States or its property. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Under this Constitutional bar the states cannot impose a tax whose legal incidence, *i.e.* the obligation to pay, falls upon the United States. *United States v. County of Fresno*, 429 U.S. 452, 459 (1977); *United States v. New Mexico*, 455 U.S. 720, 733 (1982). It is submitted that 40 U.S.C. § 602a(d) by its scant and unambiguous terms merely waives the above stated Constitutional bar so that property of the United States can be directly taxed. Such a waiver is logically consistent with the simple and general language of 602a(d).

A second cardinal principle of Constitutional law provides that a state or local tax is invalid even if it indirectly falls upon the United States if it operates so as to fall upon the United States and those with whom it deals more onerously than it falls upon state and local governmental bodies and those with whom they deal. A state tax statute discriminates against the United States by treating the state or local governments better than it treats the United States. *Washington v. United States*, 460 U.S. 536 (1983). Such discrimination is clearly unconstitutional under the Supremacy Clause. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Davis v. Michigan Dept. of the*

Treasury, 489 U.S. 803, 814-815 (1989); *Memphis Bank & Trust Co. v. Garner, et al.*, 459 U.S. 392 (1983); *United States v. New Mexico*, 455 U.S. 720, 735 n.11 (1982); *United States v. County of Fresno*, 429 U.S. 452, 463 n.11, 464 (1977); *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744 (1961); *Phillips Chemical Co. v. Dumas School District*, 361 U.S. 376, 383, 385, 387 (1960); *United States v. City of Detroit*, 355 U.S. 466, 473 (1958); *United States v. City of Manassas, Va.*, 830 F.2d 530 (4th Cir. 1987), *aff'd*, 485 U.S. 1017 (1988). Most frequently these cases involve situations wherein the legal incidence of the tax does not fall upon the United States but the legal and economic incidence of the tax is initially imposed upon a third party who is associated or deals with the United States and who passes the economic burden on to the United States. In the instant case the economic burden of the tax clearly falls upon the United States more onerously than it does state and local bodies who are exempt from the tax. Accordingly, the tax clearly discriminates against the United States and is unconstitutional unless Congress has consented to subject the involved federal property to discriminatory taxation by enacting § 602a(d).

A third cardinal principle of constitutional law mandates that a waiver of sovereign immunity whereby the sovereign United States consents to waive some of its rights under the Supremacy Clause, cannot be implied but must be unequivocally expressed. *United States Dept. of Energy v. Ohio*, 112 S. Ct. 1627, 1633 (1992); *United States v. Nordic Village Inc.*, 112 S. Ct. 1011, 1014, 1016 (1992); *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. King*, 395 U.S. 1, 4 (1969); *United States v. Testan*, 424

U.S. 392, 399 (1976). Further, statutes whereby the United States consents to waive one or more of its prerogatives are strictly construed and are not to be expanded by implication. *United States Dept. of Energy v. Ohio*, 112 S. Ct. at 1633; *United States v. Nordic Village Inc.*, 112 S. Ct. at 1014-1015; *Soriano v. United States*, 352 U.S. 270, 276 (1957); *United States v. Sherwood*, 312 U.S. 584, 590-91 (1941). In *Hancock v. Train*, 426 U.S. 167, 179 (1976), in construing whether a statute waived the sovereign's immunity to state fees and taxes the Supreme Court held that the appropriate standard to determine whether there was such a waiver was the "clear and unambiguous" expression of Congressional intent to waive immunity in the statute. In positing this standard, the Supreme Court in *Hancock v. Train*, 426 U.S. at 179, stated (footnotes omitted) "Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is 'a clear congressional mandate,' 'specific congressional action' that makes this authorization of state regulation 'clear and unambiguous.' " At other times the Supreme Court has expressed this strict construction of waivers of sovereign immunity by stating that the waiver must be "clear, express and affirmative." *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 122 (1954); *United States v. County of Allegheny*, 322 U.S. 174, 177 (1944); and *Mayo v. United States*, 319 U.S. 441, 448 (1943). *See also Federal Reserve Bank v. Metrocentre Improvement Dist. #1*, 657 F.2d 183, 186-187 (8th Cir. 1981), *aff'd*, 455 U.S. 995 (1982); *United States v. City of Adair*, 539 F.2d 1185, 1189 (8th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977).

The Supreme Court has consistently refused to enlarge by implication a general waiver of the sovereign's immunity, to suit, so as also to include a waiver of non-liability for punitive damages, penalties, and interest, and state fees but has required a specific waiver of sovereign immunity subjecting the United States to liability for such charges. *Library of Congress v. Shaw*, 478 U.S. 310 (1986); *Mayo v. United States*, 319 U.S. at 448; *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. at 122; *United States v. Louisiana*, 446 U.S. 253 (1980); *Missouri Pac. R.R. v. Ault*, 256 U.S. 554, 563-65 (1921). *See also Smith v. Russellville Prod. Credit Ass'n*, 777 F.2d 1544 (11th Cir. 1985).

Further, the Eighth Circuit has consistently refused to construe federal statutes consenting to state taxation of various types of federal properties as waiving the sovereign's immunity to liability for special tax assessments. *See Federal Reserve Bank*; *City of Adair*; and *Board of Directors v. Reconstruction Finance Corp.*, 170 F.2d 430 (8th Cir. 1948), wherein the Court of Appeals for the Eighth Circuit construed 12 U.S.C. § 531 (1964), 15 U.S.C. § 713a-5 (1976) and 15 U.S.C. § 607 (1948), whereby real property of Federal Reserve Bank, of the Commodity Credit Corporation and of the Reconstruction Finance Corporation, respectively, are made subject to state taxation, and refused to broaden the consent to taxation so as to also subject such property to liability for special tax assessments by the states.

In *United States v. Halpin*, Civil Action No. 88-0215, (E.D.N.Y. Jan. 12, 1989) (LEXIS, Genfed library, Dist file), the federal district court for the Eastern District of New York held that the waiver of sovereign immunity in 38 U.S.C.

§ 1820(a)(6) [now § 3720(a)(6)], whereby the United States consented to state taxation of real property acquired by the Veterans Administration, could not be enlarged by implication so as to be construed as a waiver whereby the state taxing authority could collect interest and penalties which had accrued on taxes due on VA property.

Finally, in *United States v. Broward County, Fla.*, 901 F.2d 1005 (1990), the Court of Appeals for the Eleventh Circuit held the statute involved in this case, 40 U.S.C. § 602a(d), whereby the United States consented to state taxation of certain properties being purchased and constructed by the General Services Administration, was simply a general consent to taxation, and could not be enlarged by implication so as to be construed as an acceptance by the United States of the applicability of state tax procedures. In reaching this conclusion the Eleventh Circuit stated, that a "[w]aiver of the rights of the United States and exceptions to the doctrine of sovereign immunity can not be implied but must be based on some express Congressional enactment." 901 F.2d at 1008, citing *Hancock v. Train*, 426 U.S. 167, 179 (1976).

The language of § 602a(d) contains no reference to any consent to discriminatory taxation or to taxation which may be other than non-discriminatory. Accordingly, no express, clear and unambiguous consent by the United States to discriminatory taxation can be found in § 602a(d).

To draw any negative implications from § 602a(d) because it fails to negate specifically any consent to discriminatory state taxation would not only violate the

aforementioned Supreme Court decisions against enlarging a consent to waiver of sovereign prerogatives by implication, but would also violate the dictates of logic. To hold that § 602a(d) by negative implication consents to discriminatory taxation would expose the United States to any type of discriminatory tax no matter how egregious, as such an implied consent would have no bounds or limits whatsoever. Accordingly, both the tenets of constitutional law and logic dictate that § 602a(d) be construed as only a general consent to non-discriminatory state taxation of federal property purchased and constructed pursuant to the authority contained in 40 U.S.C. § 602a.

It is anticipated that the appellants will argue that the legislative history of 40 U.S.C. § 602a(d) indicates it to be a consent to discriminatory state taxation, and that the prevalence of state tax statutes which existed at the time 40 U.S.C. § 602a(d) was enacted indicates that Congress accepted such discriminatory practices by not affirmatively limiting the consent in § 602a(d) to exclude discriminatory taxation. First, such an argument would fly in the face of Supreme Court precedents which hold that consents to waive rights of the United States must be clearly and unambiguously expressed and are not to be implied. Indeed, the Supreme Court in *United States v. Nordic Village, Inc.*, 112 S. Ct. at 1016, has recently rejected the argument that legislative history could supply the necessity of an unequivocal expression of consent in the following words:

> Contrary to respondent's suggestion, legislative history has no bearing on the ambiguity point. * * * [T]he 'unequivocal expression' of elimination

> of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report.

Moreover, the Supreme Court has held that legislative history is irrelevant where, as here, the statute is clear and unambiguous on its face. *Davis v. Michigan Dept. of the Treasury*, 489 U.S. 803, 808-09 fn.3 (1989); *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 199 (1977).

Second, the legislative history of § 602a(d) contains but four statements concerning § 602a(d) or its meaning. On April 19, 1972, Representative Gray stated, "During the contract term, a purchase contract building would remain on the local tax rolls helping to ease the burden of the federal presence upon the community." 118 Cong. Rec. 13,505 (1972). This statement was repeated verbatim by Senator Tower on June 7, 1972. 118 Cong. Rec. 20,107 (1972). Representative Stratton on April 19, 1972, stated, "Until the Federal Government had paid the final purchase price the buildings would be subject to real estate taxes." 118 Cong. Rec. 13,503 (1972). Finally, on April 19, 1972, Representative Harsha stated, "the buildings in question would remain in private ownership, subject to state and local taxation." 118 Cong. Rec. 13,502 (1972). This sparse legislative history does not support any contention that § 602a(d) is a consent to discriminatory taxation. Rather this history merely indicates that Congress believed that retention in private names of title to the buildings being acquired by the United States, would result in private ownership of the buildings in question with taxes being due from the private

owner until their purchase prices were paid in full and the buildings were transferred to the ownership of United States.

It is also anticipated that Appellant will argue that other states have tax structures that exempt state property and thereby discriminate against federal property being acquired under 40 U.S.C. § 602a, and thus Congress must have been considering those discriminatory situations when it enacted § 602a(d), and therefore intended § 602a(d) to be a consent to discriminatory taxation. Many states exempt both federal and state property from state taxation.[3] Other states exempt all public property from state taxation, which includes both state and federal property.[4] Still other states simply exempt state property from state taxation with no mention of federal property.[5] Another variant has states exempting both federal and state property from state taxation except insofar as federal law may provide that federal property is subject to state taxation.[6] This latter variant depends both upon the form of the state statute as well as the form of federal statute

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3. *See*: Ark. Const., art. 16, § 5(b), and Ark. Stat. Ann. § 26-3-301(4) (1987); Alaska Const., art. IX, § 4, and Alaska Stat. Ann. § 29.45.030(a)(1) (1985); Okla. Const., art. 10, § 6, and Okla. Stat. Ann., tit. 68, § 2405(a & b); Del. Code Ann., tit. 9, § 810 (1972); Md. Code Ann. § 7-210 (1986).

4. *See*: Ga. Code Ann., § 48-5-14 (1987).

5. Va. Code Ann., 58.1-3606 (1985).

6. *See*: Haw. Const., art. XVI, § 8, and Haw. Rev. Stat., § 246-36 (1977); and N.C. Gen. Stat., § 105-278.1 (1974); and Mich. Comp. Laws Ann. § 211.7 (1980).

involved as to whether the state tax is to be imposed upon a particular parcel of federal reality. Finally, in the United States' Appellee's brief filed herein, eight states were identified as having discriminatory laws, somewhat similar to the instant one.[7] (Appellee Br. 29.) With the exception of the Arizona Revised Statutes § 42-271(A)(1) as amended in 1990, and New York Real Property Tax § 400(2), no state has a statute which discriminates with such specificity and particularity against the Federal Purchase program established by 40 U.S.C. § 602a as does ¶ 500.9a, as amended, the state statute involved herein. In any event the variety of state law treatment of exemption of federal realty as set forth above and the paucity of state statutes which mandate discriminatory taxation of federal property negate any possibility that Congress intended to consent to discriminatory taxation when it enacted § 602a(d).

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7. The five state statutes which could operate to discriminate against the United States in the instant case and which were in effect at the time 40 U.S.C. § 602a(d) was enacted are: Conn. Gen. Stat. Ann., § 12-81 (1989); Kan. Stat. Ann., § 79-201a (1978); Mass. Gen. Laws Ann., ch. 59, § 5 (1956); Const. of Pa., art. 8, § 2, and Pa. Stat. Ann. tit. 72, § 5020-204(g) [Purdon 1961]; and Va. Code Ann. § 58.1-3606 (1985). In 1990 Arizona amended Ariz. Rev. Stat. Ann. § 42-271(A)(1) specifically referring to the non-exemption of federal property subject to a lease-purchase agreement. *See also* Fla. Stat. Ann. § 196.199 (West 1975); Or. Rev. Stat. § 307.040 (1965) and N.Y. Real Prop. Tax § 400 (1971).

CONCLUSION

Accordingly, this Court's prior ruling that § 602a(d) is not a consent to discriminatory taxation should not be disturbed, but should be reaffirmed.

Respectfully submitted,

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